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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1566

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Respondent.

HARRIS TRUST AND SAVINGS BANK,
Petitioner,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION PRESENTS NO QUESTION WORTHY OF REVIEW BY THIS COURT.

The petition presents no question worthy of review by this Court under the criteria laid down in Rule 19.

The basic question involved is merely the legality of a "Detour Agreement" entered into between the Rock Island and the Burlington in 1958. This is a standard form of agreement that was adopted by the Association of American Railroads in 1905. As interpreted by the lower courts, a railroad ("foreign" road) which "detours" over the line of another railroad ("home" road) assumes all risks of transportation. Specifically, they held that, under its terms, the Rock Island was obligated to bear all losses arising out of a collision between a Rock Island and a Burlington train, notwithstanding the collision was due to a defect in an interlocking plant that violated Section 25 of the Interstate Commerce Act.

This "Detour Agreement" was entered into between two bargaining equals and the indemnity and exoneration provisions held valid are reciprocal, inasmuch as a particular railroad may be the "home" railroad on one occasion and the "foreign" road on the next. In transportation emergencies, it permits railroads, in the home road's discretion, to quickly borrow the use of each other's tracks by working with each other at lower management levels. It is intended to promote the use of quick alternatives by which the "foreign" road can efficiently move persons and goods around emergency conditions on the foreign road's own tracks, that temporarily block its own operations.

The petition asserts that the Detour Agreement is invalid for two reasons, viz.: It took away the Rock Island's alleged right to recover under the Interstate Commerce Act and it was a "trackage rights agreement" which had not been approved by the Interstate Commerce Commission.

We submit, the legality of a form provision between members of the railroad industry, allocating the risks of transportation in the event of a detour by one railroad over the lines of another, presents no question of national importance that is worthy of review by this Court.

Moreover, this case presents no question of importance even to the railroad industry, in the sense that it involves questions that constantly recur. The questions presented are being raised for the first time since the "Detour Agreement" was adopted in 1905 and it may be another 65 years, or even more, before they are ever presented again. This Court's certiorari jurisdiction should not be exercised to determine rare and non-recurring points of law.

The "trackage rights" point was not even raised in the District Court, as its opinion shows (App. 1a-14a), although the Court of Appeals, despite the procedural infirmity, did consider it, and ruled adversely to the Rock Island (App. 8b). A question considered to be of such little importance by petitioner that it was not even raised in the District Court cannot now be so important as to merit further consideration by this Court.

In respect to the claim that federal public policy was violated because the Rock Island contracted away an alleged right to recover under Section 8 of the Interstate Commerce Act for the Burlington's violation of Section 25, the Rock Island proceeds on the assumption that the Railroad Safety Acts were intended to protect corporations, and other railroads in particular. We show to the contrary in

the next proposition. But whether the Rock Island's position is correct or not, the question presented certainly is not of national importance.

The first Federal Safety Appliance Act was passed in 1893 (45 U. S. C. § 1). This is the first time that it has ever been contended that corporations, as distinguished from people, were intended to be protected by the Safety Acts. Hence, this is also the first case in which it has ever been contended that a railroad or other corporation could not validly contract away this claimed right to recover. The complete absence of litigation on the precise issues shows that the detour arrangement has worked well. The railroads have been able to interpret and administer the provisions of the Detour Agreement between themselves and virtually without resort to the Courts.

Indeed, in all the years the Detour Agreement has been in force, only one other case has considered it, namely, *Alabama Great Southern R. R. Co.* v. *Louisville & Nashville R. R. Co.*, 127 F. Supp. 363 (N. D. Ala., 195), rev'd on other grounds, 224 F. 2d 1, 4 (C. A. 5, 1955), and the questions involved in that litigation did not involve either of the questions raised by the petition. We suggest, therefore, that the legality of an agreement that has been administered and interpreted by an industry for so many years, and with virtually no controversy, does not present a question of importance to anyone but the immediate parties involved.

Moreover, the function of courts normally is to hold parties to their contracts. An attempt by a party to escape its contract obligations, by leave of Court, is not a proceeding which this Court should entertain in the absence of national public interest considerations, completely absent here. The Rock Island has enforced the agreement against others (A. 53). This Court should not determine whether

the Rock Island should be released, by leave of Court, when the agreement is sought to be enforced against it.

Almost fifty years ago, when this Court's certiorari load was much lighter, Mr. Chief Justice Taft said: "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co., Inc.* v. *Coty,* 262 U. S. 159, 163 (1923). The same year he also stated for the Court that the writ should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387, 393 (1923).

Mr. Justice Frankfurter, another Justice who repeatedly emphasized that the role of this Court is to decide questions of national importance, in speaking for the Court in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70, 74 (1955), said:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."

It is difficult to conceive of questions less "cert-worthy" than those presented by the petition. Irrespective of whether the determinations of the Court of Appeals were right or wrong, the petition should be denied because the questions presented are totally devoid of any national importance.

II.

CERTIORARI SHOULD BE DENIED ALSO BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT.

A.

Even if the Rock Island Be Considered a Member of the Class Protected by Section 25 of the Interstate Commerce Act, It Could Validly Bargain Away Any Right to Recover Under That Act.

Petitioner's basic claim is that it was given a right of action by Section 8 of the Interstate Commerce Act for a violation of Section 25 and that it could not validly bargain away its right to recover under that Act. There are two answers to this contention:

1. Petitioner corporation* is not a member of the class for whose benefit the statute was based; and

2. A person possessing equal bargaining power with another can validly contract away a right of recovery under an "absolute duty" statute such as one of the Railroad Safety Acts.

First, we consider whether petitioner was intended to be protected by Section 25. This Court has stated repeatedly that, in order for a person to base a civil cause of action upon a violation of one of the Railroad Safety Appliance Acts, he must be a member of the class for whose benefit the statute was passed. *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33 (1916); *St. Louis & San Francisco Ry. Co.* v. *Conarty,* 238 U. S. 243 (1915); *Lang* v. *New York Central R. Co.,* 255 U. S. 455 (1921); *Fairport, P. & E. R. Co.* v. *Meredith,* 292 U. S. 589 (1934); *Brady* v. *Terminal R. R. Ass'n,* 303 U. S. 10 (1938). Thus, it has held that the various Railroad Safety Acts were intended for the protec-

* Inasmuch as the petition proceeds as if the Rock Island were the sole petitioner (p. 2), we do likewise.

tion of *people* standing in various relationships to a railroad: railroad employees (*San Antonio & Aransas P. Ry. Co.* v. *Wagner*, 241 U. S. 476 (1916)), employees of another railroad (*Brady* v. *Terminal R. R. Ass'n*, 303 U. S. 10 (1938)), and travelers on the highway (*Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589).

The clear implication of the above holdings of this Court is that there are "persons" who are not protected by the Acts. Petitioner is a corporation; hence, the only kind of loss it can suffer from a violation of a Safety Appliance Act is a monetary one. If the Acts protect corporations from monetary loss, then it is impossible to imagine the existence of those not protected.

With the above decisions in mind, we consider whether Section 25 was intended by Congress to protect corporations.

Congress has passed a series of Railroad Safety Appliance Acts. The first Act passed in 1893 (45 U. S. C. §§ 1-7), was amended by an Act of March 2, 1903 (45 U. S. C. §§ 8-10), and supplemented by an Act of April 14, 1910 (45 U. S. C. §§ 11-18). Then followed the Hours of Service Act in 1907 (45 U. S. C. §§ 61-64), and the Ash Pan Act (45 U. S. C. §§ 17-21) in 1908, and the Boiler Inspection Act of February 17, 1911 (45 U. S. C. §§ 22-34). Non-employees must look to state law to recover under them. *Crane* v. *Cedar Rapids & I. C. R. Co.*, 395 U. S. 164 (1969).

The foregoing statutes, although giving the Interstate Commerce Commission authority to administer them, were not passed as amendments to the Interstate Commerce Act of 1887. The first Railroad Safety Act to be passed as an amendment to the Interstate Commerce Act was the Transportation Act of 1920. Section 441 amended the Interstate Commerce Act of 1887 by adding Section 26, which authorized the Commission to order railroad carriers to

install automatic train-stop or train-control or other safety devices (41 Stat. 498).

Section 26 of the 1920 Act was repealed and the section was completely rewritten by the Act of August 26, 1937 (50 Stat. 835). Section 26 of the 1937 Act, in rewriting the 1920 amendment, added subsection (e), upon which the Rock Island relies. (It was renumbered Section 25 by Section 14(b) of the Act of September 18, 1940, 54 Stat. 919.) The Committee reports show that Congress enacted the new statute to promote the *safety of passengers and employees upon railroads.* The Senate Report (Sen. Rep. 222 to accompany S. 29, 75th Cong., 1st Sess.) states in part:

> "The provisions of the bill follow closely the provisions of existing safety laws having to do with railway appliances. * * *"

The House Report (H. R. 1081 to accompany S. 29) made substantially the same statements.

The purpose of all the Railroad Safety Appliance Acts was to protect *the lives and limbs of people only;* there was no intent by Congress to protect property rights of corporations. This is explicit by the language of the Acts and their titles. The command of Section 25(e), the Act here involved, relates only to "unnecessary peril to life and limb" and says nothing about property. This is the same language used in the Boiler Inspection Act, whose "prime purpose" is "the protection of employees and others." *Lilly* v. *Grand Trunk Western R. R. Co.,* 317 U. S. 481, 486 (1943).

Thus, although the Rock Island's claim is literally within the terms of Section 8, there is nothing to show that Congress, in passing the 1937 Act, as an amendment to the Interstate Commerce Act, intended to take the drastic and novel step of protecting corporations against monetary loss.

Merely because the Rock Island is literally within the

terms of the Interstate Commerce Act does not mean that it is a member of the class Congress intended to protect. "It is a 'familiar rule, that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers'." *National Woodwork Mfrs. Ass'n* v. *N. L. R. B.*, 386 U. S. 612, 619 (1967). For example, in *Randall* v. *B. & O. R. Co.*, 109 U. S. 478, 485 (1883), a statute gave a right of action to "any person injured" by its violation. This Court held that plaintiff could not recover on account of its violation because he was not within the class of persons intended to be protected by it.

This is 1971 and the Safety Appliance Acts have been on the books since 1893. So far as we have been able to determine, no railroad, or other corporation, has ever maintained that it had a right to recover for monetary loss caused by a violation of a Railroad Safety Appliance Act. This is persuasive evidence that corporations have never been regarded as being protected by the Acts.

But, even if it be assumed that the Rock Island was a member of the protected class, it could validly bargain away its right to recover under a contract made with a bargaining equal which also bargained away its right to recover for negligence or statutory violations when it was a foreign railroad on the Rock Island's line.

The Burlington was not acting in its capacity as a common carrier when it permitted the Rock Island to use its tracks and facilities under the Detour Agreement. *Blank* v. *Illinois Central Ry. Co.*, 182 Ill. 332, 337, 55 N. E. 332 (1899). The Detour Agreement gave it the right to refuse permission to use its facilities, unilaterally and arbitrarily. In a similar situation, the Rock Island could do likewise (Pn. 2e). Cases beyond number hold that a railroad, when not performing its duties as a common carrier in relation to another person, may lawfully contract to be exonerated or indemnified against the consequences of its own negligence.

Santa Fe, P. & P. Ry. v. *Grant Bros. Const. Co.*, 228 U. S. 177, 185 (1913); *Baltimore, etc. R. R.* v. *Voigt*, 176 U. S. 498 (1900); *Robinson* v. *B. & O. R. R. Co.*, 237 U. S. 84 (1915).

Merely because the Safety Appliance Acts impose an "absolute duty" is no reason why a railroad may not contract against liability for exoneration with a bargaining equal for violations when not acting as a common carrier. This has been the unbroken course of decision under these Acts as well as under various state statutes that impose absolute civil liability for violation.

The authorities uniformly hold that a railroad, when not acting as a common carrier, may validly contract with another that the latter will indemnify the railroad against liability to one of its employees on account of the railroad's violation of a Safety Appliance Act. *Colorado Milling & Elevator Co.* v. *Terminal R. R. Ass'n*, 350 F. 2d 273 (C. A. 8, 1965), *cert. den.* 382 U. S. 989; *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 259 (C. A. 5, 1962), *cert. den.* 369 U. S. 860 (1962); *Inland Container Corp.* v. *Atlantic Coast Line R. Co.*, 266 F. 2d 857 (C. A. 5, 1959); *C. & N. W. Ry. Co.* v. *Davenport*, 205 F. 2d 589, 594 (C. A. 5, 1953); *Terminal R. Ass'n of St. Louis* v. *Ralston-Purina Co.*, 352 Mo. 1013, 180 S. W. 2d 693 (1944). It may also exempt itself from liability under state statutes which impose "absolute liability" for their violation. *Sunlight Carbon Co.* v. *St. Louis & S. F. R. Co.*, 15 F. 2d 802, 805 (C. A. 8, 1926) ("* * * we perceive no reason why a railroad company may not, when acting in its private capacity, relieve itself from an absolute liability imposed by statute as well as from liability resulting from negligence"); *Pettit Grain & Potato Co.* v. *Northern Pacific R. Co.*, 227 Minn. 225, 35 N. W. 2d 127, 136 (1948); Annotation in 175 A. L. R. 8, at p. 108.

Petitioner strongly relies upon *Boyer* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 34 Ill. App. 2d 330, 181 N. E. 2d 372 (1962), aff'd 38 Ill. 2d 31 (1967), 230 N. E. 2d 173, *cert. den.* 390 U. S. 949 (1968). There the Illinois Court refused to enforce an exculpatory clause in a pass where plaintiff's injuries resulted from a violation of a Railroad Safety Act.

Petitioner's attempt to equate a form exculpatory clause in a pass thrust upon a passenger, probably unaware of what the clause meant, with reciprocal indemnity and exoneration provisions voluntarily entered into between two bargaining equals is an absurdity.

The so-called "contract" held contrary to public policy in *Boyer* was an "adhesion contract," which contracts are treated entirely differently by the Courts as to construction and validity. *Chandler* v. *Aero Mayflower Transit Co.*, 374 F. 2d 129, 135 (C. A. 4, 1967); *Standard Oil of California* v. *Perkins*, 347 F. 2d 379, 383 (C. A. 9, 1965). "Contracts of adhesion" have been held void and ineffective to bar even a claim for simple tort liability. *Corbin on Contracts*, Vol. 6A, § 1472, p. 599; *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69, 95 (1960); *Haley* v. *Merit Chevrolet, Inc.*, 67 Ill. App. 2d 19, 30 (1966).

The petition also relies upon *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697 (1945) (p. 10), which involved the release of a right to minimum wages under the Fair Labor Standards Act. This is a typical case involving unequal bargaining power between the parties. *Bisso* v. *Inland Waterways*, 349 U. S. 85 (1955), held that a towboat owner may not validly contract against all liability for negligent towage. One of the reasons given was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains" (p. 91). This kind of policy consideration, which is probably the one most fre-

quently applied, holding contracts invalid as contrary to public policy, is not applicable to a Detour Agreement. *Northwest Airlines, Inc.* v. *Alaska Airlines, Inc.*, 351 F. 2d 253 (C. A. 9, 1965), held that an agreement by a user of an Alaska airport to indemnify the operator against his negligence was contrary to public policy under Alaska law because the operation of the airport was a "public service" (p. 256).

In this case, the parties are of equal bargaining power. The burdens of the contract are equal on all contracting parties because, while a railroad may be a Foreign company on one occasion, it may be the Home company on the next. The public policy of expediting train movements during emergencies is served by allowing railroads to say to each other that in case of an accident, the Foreign company shall bear all loss arising from its presence. The railroads' obligations to the public are not in the slightest degree diminished by the Detour Agreement. The Burlington's judgment against the Rock Island includes sums it has paid out in claims to passengers and employees. (A. 52, 86). The Rock Island is also obligated to pay all claims arising from the collision (A. 86). Virtually all of these claims have now been settled. Since the parties could not by any private arrangement avoid their liabilities to the public, if, for any reason the Rock Island would be unable to pay any remaining claims, a person injured would still have his right of action against the Burlington. In short, since the public remains fully protected there is no public policy obstacle to enforcement of the agreement.

In 1900 this Court, in *Baltimore and Ohio Southwestern Railway Company* v. *Voigt*, 176 U. S. 498, 505, emphasized the strong public policy involved in holding parties to their contracts. The lapse of more than seventy years has in no degree weakened this public policy.

B.

The Holding of the Court of Appeals That the Detour Agreement Is Not an Unlawful Trackage Rights Agreement Is Not Contrary to the Decisions of the Interstate Commerce Commission.

The contention of Rock Island (Pn. 13-16) that the Detour Agreement is an unlawful trackage rights agreement because it was not approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act was raised for the first time in the Court of Appeals. In the District Court, Rock Island expressly stipulated that its detour operations over the line of the Burlington were "under the terms of " the Detour Agreement (A. 41). The Court of Appeals could thus properly have held that Rock Island's contention could not be raised upon appeal because it had not been raised in the trial court,* because it was contrary to and inconsistent with the theory of Rock Island's case in the trial court,** and because Rock Island was estopped from attacking an agreement under which it had accepted benefits.***

The Court of Appeals nevertheless elected to consider the merits of Rock Island's point, and correctly held (Pn. 8b) that Section 5(2) applies to trackage rights of a "continuing or permanent" nature, and not to a temporary

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* *Pullman's Car Co.* v. *Central Transportation Co.*, 139 U. S. 62, 63 (1891); *Adams* v. *Mills*, 286 U. S. 397, 416-417 (1932); *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 484-485 (1938).

** *Virginian Ry. Co.* v. *Mullens*, 271 U. S. 220, 227-228 (1926); *City and County of Denver* v. *Denver Tramway Corp.*, 23 F. 2d 287, 296 (C. A. 8, 1927), *cert. den.* 278 U. S. 616 (1928); *Cleary* v. *Indiana Beach, Inc.*, 275 F. 2d 543, 547 (7th Cir., 1960).

*** *United States ex rel. International Contracting Co.* v. *Lamont*, 155 U. S. 303, 309 (1894); *Motter* v. *Patterson*, 68 F. 2d 252, 260 (10th Cir., 1933); *Marshall* v. *New York Central R. Co.*, 218 F. 2d 900, 906 (7th Cir., 1955).

emergency use by one carrier of tracks of another. This holding is not contrary to any of the cited decisions of the Interstate Commerce Commission.

The decisions of the Commission in *Texas Midland Rail road,* 75 I. C. C. 1 (1918), and *Louisiana, A. & T. Ry. Co. Operation,* 170 I. C. C. 602, were decided before Section 5(2) was enacted, and did not involve agreements for temporary use of tracks in an emergency situation. The statement in *Texas Midland Railroad* (75 I. C. C. at 125), that "[s]ometimes the use will be occasional, but once a week, or even once a year," merely points up the fact that trackage rights may exist even though the need for using them may be occasional. The Detour Agreement does not grant any right to detour, but is a reciprocal agreement by which the parties fix the terms and conditions which shall govern a detour movement *if* such a movement is authorized in a particular situation (Pn. 1e-3e).

The decision in *Chicago, S. S. & S. B. R. Trackage Rights, Cook County, Ill.,* 307 I. C. C. 329 (1959), not only is not inconsistent with, but actually supports, the holding of the Court of Appeals. That case involved an application of the Chicago South Shore and South Bend Railroad under Section 5(2) for authorization to continue the operation of passenger trains over the line of the Illinois Central Railroad between its Kensington Station on the south side of Chicago and its Randolph Street Station in downtown Chicago. The Illinois Central submitted a valuation base for the assessment of rental which included terminal facilities north of Randolph Street that the South Shore would not use except possibly in case of an emergency. After observing that there was no evidence that the South Shore made any present use of the tracks north of Randolph Street, the Commission said that "[o]nly in the event of an emergency, such as a derailment, which oc-

curred in 1956, would the South Shore trains operate north of Randolph Street." The Commission concluded by stating that the tracks north of Randolph Street "should not be considered as property normally used or available for use by the South Shore in its operation, nor should the value thereof be included in the valuation base upon which the South Shore is to be assessed a rental." 307 I. C. C. at 343. The decision thus plainly indicates that the Commission was of the view that Section 5(2) relates to tracks "normally used or available for use," and not to tracks which might be used "[o]nly in the event of an emergency."

The Commission is charged (49 U. S. C. § 12(1)) with the duty of executing and enforcing the provisions of the Interstate Commerce Act. The fact, mentioned by Rock Island (Pn. 6, 13), that the Commission has never approved the Detour Agreement, notwithstanding its long and widespread use throughout the railroad industry, together with the further fact that the Commission's published reports do not show that any application has ever been filed by any carrier for such approval, evidences a practical construction of Section 5(2) by the railroad industry and by the tribunal charged with the enforcement of the statute that is contrary to the construction urged by Rock Island.

The practical construction of Section 5(2) is consistent with the emergency service provisions in Section 1(15) of the Interstate Commerce Act (49 U. S. C. § 1(15)). Under those provisions, the Commission, in case of an emergency, is authorized "to require * * * joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals * * * upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may

after subsequent hearing find to be just and reasonable * * *". This statutory provision definitely shows that Congress not only was willing, but actually preferred, that the terms for temporary use of tracks in an emergency be fixed by the carriers involved.

C.

Even if the Detour Agreement Was an Unauthorized Trackage Rights Agreement Within the Meaning of Section 5(2) of the Interstate Commerce Act, Its Indemnity Provisions Are Not Void.

Congress has not declared that unauthorized trackage rights agreements shall be void, as Rock Island erroneously suggests (Pn. 13), but has merely declared them "unlawful" (49 U. S. C. § 5(4).* A contract which is made unlawful by a statute will not be held void unless the legislative intention to invalidate is clear. *Harris* v. *Runnels,* 53 U. S. (12 How.) 79, 84-85 (1851); *Macco Construction Co.* v. *Farr,* 137 F. 2d 52, 55-56 (9th Cir. 1943); *McCullough Transfer Co.* v. *Virginia Surety Co.,* 213 F. 2d 440, 442 (6th Cir. 1954); *Talco Capital Corp.* v. *Canaveral International Corp.,* 225 F. Supp. 1007, 1013-1014 (S. D. Fla. 1964), *aff'd sub nom. Canaveral International Corp.* v. *Talco Capital Corp.,* 344 F. 2d 962 (5th Cir. 1965); *Ets-Hokin & Galvan, Inc.* v. *Maas Transport Inc.,* 380 F. 2d 258, 260-261 (8th Cir.), *cert. den.* 389 U. S. 977 (1967). In the case last cited, a contract for transportation services which was in violation of the Interstate Commerce Act was nevertheless held "valid and enforceable."

* In the case of railroad securities, for example, Congress adopted a different policy. In Section 20a(2) of the Interstate Commerce Act Congress declared that the issuance of securities without Commission authorization is "unlawful," and in Section 20a(11) it expressly declared that securities so issued are "void," 49 U. S. C. § 20a(2) and (11).

The case of *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946), cited by Rock Island (Pn. 13), is not one where this Court refused to enforce a trackage rights agreement that had not been approved by the Interstate Commerce Commission. The case related to the reasonable value of the use made of a line of railroad *after* the trackage rights agreement had been terminated, and this Court held that the question of a reasonable trackage rental should have been referred by the trial court to the Commission for an administrative determination. 328 U. S. at 146-151. The decision in *Chicago & N. W. Ry. Co.* v. *Peoria & P. U. Ry. Co.*, 319 F. 2d 117 (7th Cir. 1963), *cert. den.* 375 U. S. 969 (1964), which Rock Island also cites (Pn. 13-14), was one where anticompetitive clauses in a contract that were injurious to the public were held to be in violation of the Sherman Act. 319 F. 2d at 121-122.

CONCLUSION.

For the reasons above stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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